



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

Some Reasons Why the Code States Should Adopt the Uniform Sales Act*

THE purpose of this article is to recommend the Uniform Sales Act for adoption in the Code States, i. e., in California, Montana, North Dakota, and South Dakota.¹ As the Uniform Sales Act is a codification of the American common law on the subject of sales, it seems appropriate before dealing at large with the present condition of the law, to make a few preliminary remarks on the subject of codification, to show how long is its history, how wide is its prevalence, and how appropriate it is for remedying present defects in the law of these states. After these preliminary observations follows a short explanation of two conspicuous defects in the law of sales which the adoption of the Uniform Sales Act would go far to remedy. Next in order is a detailed examination showing the more important particulars in which the Uniform Sales Act would improve the law. Lastly it is shown why the objections which may be urged against the Uniform Sales Act are unsubstantial.

PRELIMINARY SURVEY OF CODIFICATION.

Codification is the act or process of reducing all the law upon one or more general subjects to a code. It is a new, systematized statement of the law, enacted as one statute.²

The ancient world.—A thousand years of legal development in Ancient Rome beginning with the Twelve Tables culminated in

*This article is largely a reproduction, with some changes and elaborations, of the material in an article by the same writer entitled, "Some Reasons Why North Dakota Should Adopt the Uniform Sales Act" which appeared in the *Quarterly Journal of the University of North Dakota*, vol. 7, pp. 54-69 and 120-153 (Oct., 1916 and Jan., 1917). The editor of the *Quarterly Journal* has kindly extended permission to make free use of that material for the present article. The justification for expanding that article into this present form is that much of the argument has general as well as local application, and that even what is merely local usually applies in all four of the Code States, the legal situation under the Field Code being in all very similar.

¹ Since this article was prepared the Uniform Sales Act has been adopted in North Dakota, following the suggestion to that effect in the *Quarterly Journal* mentioned in the above note.

² From Anderson's *Dictionary of Law* (1893), p. 190. See also Bouv. L. D. (8th ed., 1914), p. 507.

an epoch-making period of codification.³ The most thorough work of codification which this period produced is that which bears the name of Justinian. Justinian's codification has stood the test of time, has preserved to the modern world the laws of Ancient Rome, and has thus furnished to much of the modern world a large part of the foundation upon which its present day law rests.⁴ It is said to be a masterpiece of legal achievement, whose superiority over the heterogeneous mass of law which preceded it is universally recognized.⁵

Modern European codes.—Further codification of the law has in more recent times taken place in Continental Europe. The old German Code goes back to Frederick the Great. The Code Napoleon,⁶ framed a little over a hundred years ago, has been widely followed in Europe outside of France as well as where it originated, and forms the basis for the law of South America, Central America, Mexico, and Louisiana.⁷ In recent years the new German Code,⁸ the most thorough work of general codification that has yet appeared,⁹ was adopted in the German Empire and has become the basis for legislative codification in Russia, Switzerland, and Japan.¹⁰

Anglo-American experience.—(a) *Archaic codes.*—At the dawn of English political history we have some "laws" which were general enactments to sum up what had preceded, based on man's memory, custom, etc., but not on any records of either legislative or court proceedings.¹¹ These old laws still exercise the anti-

³ Hadley, Introduction to Roman Law (1911), p. 1. For a systematic account of this development see Muirhead, Introduction Historique au Droit Privé de Rome (1889). For a shorter, concise account see Sohm's Institutes of Roman Law (Ledlie's Translation, 3d ed., 1907), §§ 9-22.

⁴ Sohm's Institutes of Roman Law (Ledlie's Translation, 3d. ed., 1907), §§ 22, 28.

⁵ See e. g., Jenks, Edward I, in 1 Select Essays in Anglo-American Legal History, p. 160.

⁶ See Wright, Translation of French Civil Code (1908).

⁷ Pound, Outlines of Lectures on Jurisprudence (1914).

⁸ See Wang, Translation of German Civil Code (1907).

⁹ Ames, Lectures on Legal History (1913), p. 368.

¹⁰ Pound, Outlines of Lectures on Jurisprudence (1914).

¹¹ See Thorpe, Ancient Law and Institutions of England; Schmid, Gesetze der Angelsachsen (1858); Lieberman, Gesetze der Angelsachsen (1898). A convenient collection illustrating the character of these laws may be found in the earlier part of Stubb's Select Charters (9th ed., 1913). Also compare these laws with the archaic law of the German tribes, for which see the "Leges Barbarorum," and with archaic Irish Law, in the Brehon Laws.

quarian and the legal historian, but have long since become obsolete as rules of law by which to settle any controversy between litigants.

(b) *Unsuccessful projects*.—Apart from these ancient laws, based on mere oral tradition, which have now been antiquated for a thousand years, the Anglo-American system of law has never in its entirety been systematically codified. Instead of codified law we have had a heterogeneous body of law consisting of the common law, so-called, a mass of decided cases occurring in litigation, and the statute law, a mass of separate statutory enactments. There have been accessible court records since the time of the "Year Books,"¹² but no systematic general codification has yet resulted. From the time of Henry VIII to our own day various projects for codification of the whole law have been undertaken,¹³ but without the indispensable culmination in statutory enactment as law of the codes proposed.

(c) *The Field Codes*.—The most important attempt to codify the whole law was made in the United States a little more than fifty years ago. The result was the Field Codes, drawn up by a little group of New York lawyers of which Mr. Field was the leading member, as a codification of the American common law. As a complete system these codes failed of legislative enactment in New York, as they did in most of the other states. One of them, the Code of Civil Procedure, has been widely adopted, while in the four states of California, Montana, North Dakota, and South Dakota all the Field Codes were adopted in their entirety.¹⁴ The failure of the Field Codes to secure legislative enactment into law is attributed mainly to two causes, the crudeness of the codes themselves, and the conservatism of the bar trained under the English common law system toward any such innovation as codification of the whole law.¹⁵

(d) *Private codification*.—In recent times we have had, both

¹² I. e., since the time of Edward I. See Year Books edited by Horwood in the Rolls Series. See also, Reeves, History of English Law (1880); Pollock & Maitland, History of English Law (2d ed., 1898).

¹³ Pound's Outlines of Lectures on Jurisprudence (1914). The project under Henry VIII, Bacon's Project (1614). Lord Westbury's plan (1860-1863).

¹⁴ It should be noted in this connection that the Codes, where once adopted, have never been repealed.

¹⁵ Williston, in 63 Pennsylvania Law Review 197.

in England and in this country, some attempts by various individuals, frequently law professors, to state some branch of the law in definite propositions compiled in one book. Such is, for example, Wigmore's Pocket Code of Evidence.¹⁶ These attempts at codification by individuals, on their own responsibility, of course, have not the binding force of statutory enactment. They serve the purpose, however, of reducing the law to definite statements as guides to courts and practitioners, and in a measure pave the way for more thorough codification.

(e) *Commissioners on Uniform State Laws.*—The most important practical steps in the direction of codification in recent years in the United States have been taken by the Commissioners on Uniform State Laws. They act for the American Bar Association in drawing up codes for certain branches of the law, and recommending the draft codes to the legislatures of the various states for adoption. Some of the draft codes recommended by the Commissioners are the Negotiable Instruments Law, the Uniform Sales Act, the Partnership Act, the Warehouse Receipts Act, etc.¹⁷ So far the Negotiable Instruments Act has met with widest approval, having been adopted in most of the states.¹⁸ Some have only recently been agreed upon and recommended, while others are still in preparation.

The Uniform Sales Act, which it is the purpose of this article to recommend for adoption, is one of these Acts or partial codification originating with the Commissioners on Uniform State Laws. It was drawn up by a recognized authority on the law of sales, Professor Samuel Williston of the Harvard Law School. His drafts were for several years submitted to elaborate examination and criticism, and several revisions were made. The final draft was agreed upon by the Commissioners in the year 1906

¹⁶ Other examples may be given, as Wigmore, Summary of Torts, in 2 Wigmore, Cases on Torts. A similar tendency appears in the black letter propositions in the West Publishing Company's Hornbook series.

¹⁷ For a complete list of the Uniform Acts recommended, and the states where each has been adopted, see Am. Bar Ass'n Rep., 1915, p. 913. The Commissioners on Uniform State Laws also publish copies of their proceedings containing this information together with much other valuable material. Copies may be obtained on application to the Secretary, George B. Young, Newport, Vermont.

¹⁸ Am. Bar. Ass'n Rep. 1915, p. 913. Also see Brannan, Negotiable Instruments Law (2d ed.); Crawford, Negotiable Instruments Law (4th ed.).

and recommended to the states for adoption.¹⁹ The Uniform Sales Act has, up to the present time (March, 1917), been adopted in sixteen American jurisdictions: Arizona, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Wisconsin, Wyoming, and Alaska.²⁰ It will be seen by the geographical location of most of these states, that the older and more highly developed commercial section of the country has, for the most part, already adopted the Uniform Sales Act, and that among the states which have adopted it is New York, whose court decisions are, with us, such persuasive precedents on account of our living under the Field Code which was drafted in New York.

Summary of history of codification.—From this cursory view of the history of codification it is apparent that codification is a natural step in the development of law, that it has come after a period of development in ancient as well as in modern times, and that at the present time practically all the advanced nations of the world, the English-speaking excepted, live under some form of codified law the history of which goes back to Justinian's codification of the law of Ancient Rome. Even in the English-speaking world codification has for a long time been a favorite project with many reformers and is in our own day gradually becoming an accomplished fact.²¹

WHY CODIFICATION IS AN APPROPRIATE METHOD OF LAW REFORM IN THE CODE STATES.

The Field Codes the basis of our law and practice.—In recommending the Uniform Sales Act for adoption in the Code States the arguments for and against general codification need not at length be repeated. We are in the Code States committed, so to speak, to the principle of codification by having adopted the Field Codes. Under the Field Codes we have lived for at least a generation. As lawyers we have become habitual code-readers on every legal question that arises. As a people we have had more than the usual occasion for becoming imbued with the idea, however mistaken, that the answer to every disputed question

¹⁹ See preface to Williston, Sales.

²⁰ Am. Bar. Ass'n. Rep., 1915, p. 913.

²¹ For a bibliography of the literature of codification, see Pound, Outlines of Lectures on Jurisprudence (1914), § XIV.

of law is to be found in the statute book. Seldom, indeed, in the trial court, does either lawyer or judge attempt to go much deeper into the question of law involved if they can find a specific code provision in point.²² The work of harmonizing and piecing out the code provisions is generally left to the higher courts on appeal, and even those courts often dismiss their discussion of the merits of a question by a curt reference to a code section as controlling.²³ Having adopted the Field Codes in their entirety and lived under them for a generation or more without thought of their repeal, we certainly have effectively approved the principle of codification.

Modifications by legislative enactment.—As we are not averse to codification but rather emphatically committed in its favor, so we are committed to revisions of the codified law we have if it seems that improvement can thereby be secured. It is axiomatic that a complete and final code is impossible.²⁴ As conditions change and development takes place in the world about us, to which the law is to be applied, new conclusions must be worked out from old principles, and from time to time these new developments ought to be worked into the code by revisions.²⁵ Such, indeed, has been the practice so far as our legislative history is concerned. Never a legislative session passes that there is no amendment to our Code, nor are these amendments always confined to mere details.²⁶ These legislative changes have from time to time been worked into the Code at each periodical revision. Starting with the code that is based upon the common law, derived from judicial decisions, we have made legislative changes in it and incorporated these changes in code revisions. Our legislative history, therefore, warrants the statement that we are committed to the principle of codification, and

²² Even the most casual attention, in observing the trial of cases in court, will sustain the accuracy of this remark.

²³ Instances of such dealings with cases may be cited at random: *Cysewski v. Fried* (1912), 24 N. D. 152, 139 N. W. 104; *Catlett v. Stokes* (1906), 21 S. D. 108, 111, 110 N. W. 84; *In re Grogan's Estate* (1909), 38 Mont. 540, 100 Pac. 1044; *Baker v. Baker* (1909), 9 Cal. App. 737, 100 Pac. 892.

²⁴ Terry, *Leading Principles of Anglo-American Law*, § 609.

²⁵ *Ibid.*

²⁶ Extended reference to support the statement of such a well-known fact is unnecessary. In California and North Dakota, where the annotations to the Code are elaborate, the Code reveals in its very pages the frequency of such amendments and changes.

are also committed to the propriety of legislative changes in our codified law whenever such changes can remedy defects and secure substantial improvement.

Codification of modern development in case law necessary for completeness.—The original Field Codes were based largely on case law, the product of judicial decisions, existing in America at the time they were drafted. Since that time, as before, with the constant course of litigation, case law has been developing throughout the country.²⁷ The developments in the case law, however, have not yet been worked into our Code. Our code revisions have thus been only partial in their character, taking account of the legislative changes, but taking no account of the progress which is made in the law through the process of judicial decision. To complete the system of code revision, to let it embrace not only the legal progress brought about by legislation, but also the progress brought about by judicial decision, the more recent case law must be codified and that codification adopted as part of our code system. A thorough codification of the recent case law on the subject of sales is presented in the Uniform Sales Act. Far from being a startling departure, therefore, the adoption of the Uniform Sales Act would, with us in the Code States, be only a simple matter of course. Completing our code revision by including this codification of countrywide judicial decision, the adoption of the Uniform Sales Act would make no startling changes but would bring our code into accord with the law of the time.

SOME PRESENT DEFECTS IN OUR LAW.

Stronger reasons, however, than merely the advantage of embodying the law we have in a definite code suggest themselves for the adoption of the Uniform Sales Act. It is the purpose in this article to point out briefly two conspicuous defects in our law, and to indicate how these defects can be in some measure corrected by the Uniform Sales Act. These defects are: first, lack of uniformity with the law of other states; and second, lack of certainty as to what our own local law is.

²⁷ In recent years the increase in the current output of case law has become so marked that the problem of keeping abreast with this "welter of decisions" has become a frequent topic of consideration at bar association meetings and other gatherings of men professionally interested in the legal situation.

Lack of uniformity with the law of other states.—The first of these defects, lack of uniformity with the law of other states, is constantly leading to confusion, especially in commercial matters, as transactions on an increasingly large scale involve action in different states governed by divergent laws on the same subject matter. Thus, with a promissory note made in North Dakota, payable to a person living in Minnesota, and by him indorsed in Iowa or Chicago, etc., if the laws of each of the respective states are different in regard to these simple transactions relative to a single negotiable instrument, the greatest uncertainty and confusion as to rights of the different parties must result. To remedy this situation in regard to negotiable instruments, the Negotiable Instruments Law, the first and crudest of the Acts proposed by the Commissioners on Uniform State Laws, has been adopted in nearly all the states of the Union.²⁸ The lack of uniformity between the laws of different states in regard to other commercial transactions, notably in regard to sales, bills of lading, etc., is equally conspicuous, though less progress has been made in curing the defect.²⁹ It is a matter of every-day occurrence that goods are bought in one state by parties living in another, and that goods are shipped from state to state. Without uniformity as to when delivery of possession is essential to a valid sale, as to what is good consideration to make a contract binding for the sale of goods, as to what is necessary to be done to pass title, etc., such every-day transactions can be carried on only with the risk of financial loss and disappointment in litigation whenever anything occurs to upset the calculations of the parties or to cause disagreement between them over their bargain.

It is needless in this article to examine at length the evils caused by lack of uniformity between the different states in regard to their commercial law. Every recent report of the American Bar Association contains statements and arguments from the Commissioners on Uniform State Laws covering elaborately this phase of the question.³⁰ It is primarily to remedy this situation throughout the country as a whole that the Uniform

²⁸ Am. Bar Ass'n Rep., 1915, pp. 913, 914.

²⁹ Am. Bar. Ass'n Rep., 1915, p. 914, shows that the Uniform Sales Act has so far been adopted in sixteen jurisdictions, as against forty-seven jurisdictions which have adopted the Negotiable Instruments Law.

³⁰ See, for example, Am. Bar Ass'n Rep., 1915, pp. 919-948, and the Report for 1914, pp. 1044-1089.

Acts, including the Uniform Sales Act, have been proposed for adoption. The difficulties arising from lack of uniformity are present with us, as they are in other states. The Uniform Acts can succeed in overcoming them only so far as they are generally adopted by the different states. By adopting the Uniform Sales Act we therefore not only improve our own law in this respect, but contribute that much toward improving the law of every other state throughout the country.

Lack of certainty.—The second defect in our law with which this article is concerned, the lack of certainty as to what our own local law is, touches us even more closely than the lack of uniformity with the law of other states. It is a defect in which the law of most of the Code States is very conspicuous. Every lawyer in active practice knows how difficult it often is to advise a client who comes to consult him. The lawyer's difficulty may be due of course to uncertainty as to what actually happened to cause the trouble. It is frequently due, however, to the impossibility of finding out what the rule of law is.

(a) *Lack of certainty as to the facts involved.*—Lack of certainty as to the facts in dispute between parties is of course a problem inseparable from litigation. Where two parties get into a controversy it often happens that they disagree as to what words were spoken in their dealings with each other, that they disagree as to the quality of the goods supplied, etc. Where the parties disagree as to the facts, where there is no agreement as to what really happened, no lawyer can presume to be omniscient enough to foretell with exactness what the jury, on consideration of all the evidence, may find the facts to have been. No legislation, and no amount of litigation, can preclude occasional disagreement between parties as to what actually happens in their current transactions. Such disagreement will lead to litigation so long as neither will yield the whole point and parties are law-abiding enough to resort, not to brute force, but to the orderly process of law for the settlement of their controversies. Lack of certainty as to the facts is therefore inevitable in ordinary litigation.

(b) *Lack of certainty as to what the law is.*—Lack of certainty as to what the legal rule is, as distinguished from lack of certainty as to what are the facts involved, is a defect which

can be measurably remedied, but which, while it remains, produces quite as much expensive and unsatisfactory litigation as is produced by lack of certainty as to the facts. How often our Supreme Courts preface their opinions, in deciding cases, with the remark that there is practically no dispute as to the facts involved!³¹

The lack of certainty as to what our own local law is, is due mainly to two causes. First, the Code under which we live was a crude first attempt at general codification made by men who were too few and too busy with the duties of an active law practice to study with sufficient care and arrange and correlate effectively all the law they were called upon to codify. The Code, furthermore, was drawn up more than fifty years ago when the conditions under which business was done were very different from what they are now, and when many of the questions which now occur and recur had never arisen. Our Code, therefore, is not only a crude piece of codification,³² but is also entirely silent on many vital questions of commercial importance.

The second cause for the lack of certainty in our local law is the meagerness of our own authoritatively binding decisions, in comparison with the immense array of conflicting precedents from other states, all of which are more or less persuasive but none of which are binding upon us as authorities. Our local reports number only relatively few volumes. The number of volumes of reports of decisions from other states, which are for us persuasive but not binding authorities, runs into thousands. Our line of local decisions goes back only about thirty-five years. The decisions in many other states go back a hundred years or more, and for the period before that, the English cases go back hundreds of years further still.³³ Our local decisions have

³¹ The following are a few North Dakota cases cited at random as illustrations: *Bauer v. Union Central Life Ins. Co.* (1911), 22 N. D. 435, 133 N. W. 988; *Greenleaf v. Minneapolis, St. P. & S. S. M. Ry. Co.* (1915), 30 N. D. 112, 151 N. W. 879; *Ellison v. City of Lamoure* (1915), 30 N. D. 43, 151 N. W. 988; *Harney v. Wirtz* (1915), 30 N. D. 292, 152 N. W. 803; *Hart-Parr Co. v. Finley* (1915), 31 N. D. 130, 153 N. W. 137.

³² Williston, in 63 *Pennsylvania Law Review* 197.

³³ This description fits particularly the states of Montana, North Dakota, and South Dakota. The lack of local reports is not so conspicuous in California, this state being considerably older and having a correspondingly longer line of local decisions. The argument from the crudeness of the Field Code applies in full force in California, however, while the argument from lack of uniformity with other states carries

decided relatively few questions in comparison with the number of questions that have arisen and been passed upon, taking the courts the country over. These decisions from other states, however, are often conflicting, while all are more or less persuasive as precedents. Without local decisions in point we are therefore in a conspicuously worse position, so far as certainty of the law is concerned, than many of the older states, each with its own line of authoritative decisions settling its own local law.

The difficulties produced in practice by the lack of certainty as to what the law is may be conveniently illustrated by a concrete example. A farmer orders a machine from a machine company, to be delivered a certain time later. Before the time for delivery something happens to cause him to change his mind. He notifies the company that he does not want the machine. The company, insisting upon its contract, ships the machine and claims the contract price. What are the rights of the parties?³⁴ If the company sues the farmer for breach of his contract it will recover damages for the breach, i. e., it will recover the difference between the contract price and what the company could obtain on a re-sale of the machine.³⁵ This may be nothing at all, and is ordinarily likely not to be a great deal, for example, \$100. If the company is allowed to recover the full contract price it will foist the ownership of the machine upon the farmer without his consent, and will get, if the machine is an expensive one, several thousand dollars. At this stage the farmer consults a lawyer to find out whether he must take and pay for the machine or whether he need only pay such damage as results to the company from his refusal to take it. The lawyer looks up the Code and finds nothing decisive on the question whether title can be cast upon a person without his consent to receive it. He next looks diligently through his set of local reports. He looks next at the authorities from other states for guidance. In a number of states the question has not been decided. It has been decided in a considerable number of states, but different

even greater weight there than in western states generally, since there is even more interstate business. For a more elaborate description of this situation with reference to the country at large, see Williston, in 63 *Pennsylvania Law Review* 203.

³⁴ This illustration is taken from a recent North Dakota case: *Hart-Parr Co. v. Finley* (1915), 31 N. Dak. 130, 153 N. W. 137.

³⁵ *Mechem, Sales*, §1690, and numerous authorities cited.

states have decided it in different ways.³⁶ Some have decided that if a person contracts to receive title, the title may thereafter be forced upon him without any further consent to receive it. Others have decided that a contract to buy goods, like any other contract, may be broken by either party, the party breaking it becoming liable to pay damages for the breach. Having exhausted the available material for finding out what the law is, what is the lawyer to tell his client? If he is thoroughly candid he can only tell him that the law in his jurisdiction is yet undecided on his question, but that if the client cares to bear the expense of litigating the case till it can reach the Supreme Court his question may be decided. Still, which way it will be decided he can only guess.

That the above illustration as to uncertainty in the law is not unique but typical, as applied to the law of sales, may be demonstrated even by a casual glance at the extensive list of questions which will be later presented in regard to which the Uniform Sales Act provides definite rules of law where our codes and local case law are silent or inconclusive. These examples, of course, cannot purport to be a complete enumeration of the matters in regard to which our law of sales is uncertain. They are enough, however, to indicate that in regard to many ordinary commercial transactions it is impossible to tell with any certainty, in advance of litigation on the particular point, what the rule of law actually is.

The condition of our present law of sales is, therefore, curtly expressed in the one word "uncertainty". The Code is silent on a great many important questions. Relatively few of these have yet been decided by our highest courts. On many of them the authorities from other states are in more or less conflict. Every such question with us, therefore, presents a problem on which no lawyer can satisfactorily advise his client in advance. To get it settled involves the painful, dilatory, expensive, and uncertain process of litigating every point and appealing it to our local Supreme Court for final decision. This process touches but a single point at a time, leaving the old uncertainty still prevailing as to which way our court will hold

³⁶ Mechem, Sales, § 1694. See also elaborate collection of authorities on each side of this question in Williston, Sales, §§ 563-66.

on all the other questions. This is our condition, too, while many of these questions have been variously dealt with by other courts, whose decisions, though not always very helpful as precedents because too conflicting, have supplied the material embodied in definite rules found in the Uniform Sales Act.

(c) *Certainty the prime requisite*.—Lest it be thought that a fetish is here made of legal certainty, a few words must be said on the question whether certainty is preferable to growth and development in the law.

Activity and change is the law of life. Everything which is in process of development must contain some elements of uncertainty. Technical rules of law form no exception to this general law of life. When the law ceases to grow the law is dead.³⁷ Every legal rule must in course of time be subjected to a process of growth and development which may change the force of its application. Every legal rule, like every moral precept, must be subjected to a process of progressive interpretation.³⁸

On the other side, without some regularity in application there can be no rule of law at all. As has been aptly said, "Law is the quality of being uniform and regular in a series of events, whether in human or in external nature."³⁹ Constant change in the law produces so much uncertainty that the rule of law itself is apt to be lost. Law which is in the process of growth must necessarily be somewhat uncertain. Then, is our alternative the unpleasant one of growth with uncertainty or certainty with stagnation?

The solution of the problem thus presented is found in two directions. In the first place, we must determine the relative importance of growth or of certainty in any particular field to which the law is to be applied. There are parts of the law where it is important that growth should be easy, where the importance of a set rule is of minor consequence. Thus, what

³⁷ Holmes, *The Common Law* (1881), p. 36.

³⁸ The most conspicuous illustration of this process as applied to definite legal rules is to be found in the Roman legal development under the Twelve Tables, which in theory remained unchanged for a thousand years. See Sohm's *Institutes of Roman Law* (Ledlie's Translation), §12. See also Muirhead, *Introduction Historique au Droit Privé de Rome* (1889).

³⁹ Wigmore, *Summary of Torts*, §2, in 2 Wigmore, *Cases on Torts*, Appendix A.

is reasonable force to use in expelling a trespasser may vary with circumstances and may change with the times. The determination in the particular case is of minor consequence as far as it affects the rights of other parties. So, speaking generally, though it is impossible to make sharp distinctions here, the rules of law governing ordinary human conduct should be capable of ready development to fit the cases to which they have to be applied. On the other hand, there are some situations in which the importance of having a definite rule understood by the parties is far greater than the importance of change and growth in the particular rule adopted.⁴⁰ The conventional example of the law of the road affords a ready illustration. It is highly important, especially in this age of automobiles, that parties should know to which side to turn to avoid collision, but it is of little or no intrinsic importance whether the rule requires them to turn to the right or to the left. So, in the law of property, it is considered more important to preserve the rules as they are, which people may find out in order to adjust their dealings accordingly, than to make frequent changes to remedy particular cases of hardship, because the ultimate result of frequent changes in property law will be to shake titles and undermine the security of acquisitions, which will destroy the incentive to accumulation of property.⁴¹

In which class of cases do commercial transactions fall? Do they call for ready growth and change in the rules of law, with consequent uncertainty, or do they call for certainty as the most important consideration? The answer must be in favor of certainty. Unless, for example, there were some assurance that the obligation to pay debts would continue to be recognized by the law, money would be lent only at extortionate rates, and development of the country's resources on the basis of conservative credit would be impossible. Unless there is certainty in the laws affecting commercial transactions, such as buying and selling, and the giving of credit, such transactions can be entered into only

⁴⁰ The suggestion that rules of law applicable to conduct should be flexible for the sake of securing justice in administration, while rules of property should be rigid, for the sake of security of acquisitions, is derived from lectures by Professor Pound, now Dean of the Harvard Law School, in a course on Jurisprudence.

⁴¹ See, e. g., John Stuart Mill, *Principles of Political Economy*, Book V. ch. 8, § 1.

at the risk of disappointment and litigation. If the rules of law are certain, parties may find out in advance what they are and regulate their conduct accordingly. If the rules of law are settled, business can be done more effectively because done with greater security.⁴² Even if no inquiry be made in advance, if the rules of law are settled, a controversy can usually be settled without litigation, or, at most, by a trial of the facts in the lower courts. Without reasonable certainty as to the rules of law governing their transactions parties cannot go far in the ordinary present day commercial transactions at all. The greater the certainty as to the rules of law the greater is the security with which business can be done,⁴³ and the greater is the opportunity for settling controversies without resorting to litigation.

The second answer to the alternative of growth with uncertainty or certainty with stagnation is found in the fact that even conventional rules, laws of property, and codified law, are themselves subject to a slow process of progressive interpretation,⁴⁴ and can even be changed by legislative fiat, like any other laws, if such change seems necessary. The alternative is not one between growth and stagnation, but merely a question of where the emphasis is to be placed, on ready change, or on such certainty as will enable business to be carried on with reasonable security.

The conclusion therefore is that, as to commercial transactions, such as sales, the prevailing uncertainty of our law is not a boon indicative of healthy growth, but an evil hampering the conduct of business which has been tolerated only because apparently inevitable. If this uncertainty is not inevitable but in a measure avoidable, through the adoption of the Uniform Sales Act, we should all be willing, by adopting that Act, to reduce uncertainty to certainty.

The inquiry follows how the adoption of the Uniform Sales Act would contribute to cure the evils of uncertainty and of lack of uniformity which have been here set forth.

Lauriz Vold.

University of North Dakota,
Grand Forks, North Dakota.

⁴² See John Stuart Mill, *Principles of Political Economy*, Book V, ch. 8, § 3.

⁴³ Adam Smith, *Wealth of Nations*, Book III, ch. 2.

⁴⁴ See n. 38, *supra*, on the progressive interpretation under the Twelve Tables.